



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MACHAKOS  
APPELLATE SIDE  
CRIMINAL APPEAL 48 OF 2004**

**(From Original Conviction and Sentence in Criminal Case No. 2067 of 2003 of  
the Chief Magistrate's Court at Machakos: S. M. Kibunja Esq. on 12.2.2004)**

**PETER KIMATU MUTUA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**CONSOLIDATED WITH**

**Criminal Appeal 49 of 2004**

**PATRICK KYALO MUTINDA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

The two appellants Peter Kimatu and Patrick Kyalo Mutinda were charged in Machakos Chief Magistrate's Criminal Case 2067/03 with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. After the trial the two appellants were found guilty of the offence, were convicted and sentenced to death as by law provided. They had been charged with a third person who was acquitted under Section 215 Criminal Procedure Code. Being dissatisfied with the conviction and sentence the appellants filed these appeals No. 48/04 and 49/04. The same have been consolidated to be heard as Criminal Appeal No. 48/2004.

The appellants in their petitions of appeals filed 2 and 6 grounds each respectively. The said appeals can be summed up as follows:

That the appellants were not properly identified as the robbers. That the court erred in finding that the appellants were found with the complainants stolen property; that the charge of Robbery with violence was never proved as there was no medical evidence adduced, and lastly that their alibis were never displaced.

Briefly, the case before the lower court as we understand it is that P.W.1 was on 3.7.2003 going home from Mutituni Market at about 9.30 p.m. He met first appellant who was with second appellant. First appellant talked to complainant asking him if he was going home and P.W.1 responded in the positive. He

crossed and noticed the two following him going to the path that coffee shamba and behind the shops he saw third accused from them. He saw them by means of the electricity shops from the shops. When in the coffee plantation, first appellant attacked him by holding his shoulders while second appellant placed a piece of timber on his neck and knocked him down. Accused 1 then removed his trouser 2500/- coat and shoes. P.W.1 could not raise alarm as his throat was squeezed. He went home naked. Next day he reported to Administration police at Chiefs camp. One of the administration police was P.W.5 Administration police constable Rono. P.W.5 said P.W.1 gave him the names of the suspects as first and second appellants. P.W.1 led the police to the homes of the appellants where were arrested. The appellants then gave information which led to the recovery of the complainants stolen property. The shoes were found with one Mutua who worked in a bar. P.W.3 who owns the bar testified that the said shoes were left there by first appellant who had taken beer and left the shoes as security promising to pay later. P.W.4 claimed that first appellant sold to him the coat which P.W.1 later identified as his. P.W.2 a watchman at the said shopping centre claimed to have seen the appellants rob the complainant and informed the complainant as such on the next morning.

The first appellant claimed to have disagreed with the complainant because the first appellant objected to complainant buying his grandmothers land and complainant threatened him. Second appellant was just arrested from his house for no appellant reason.

In their submissions the appellants argued that the case before the lower court was partially prosecuted by Corporal Ngela who is unqualified prosecutor. On page 3 of the record of appeal, Corporal Ngela appeared on a mention date. No hearing proceeded. In our view the appearance by Corporal Ngela on a mention date does not amount to him prosecuting the case. This issue was considered in the case of **KALE AHMED KALE V. REPUBLIC CR.APP 577/00** in which a 2 bench hearing court bench observed that the routine acts of adjourning cases does not go to the root and cure of prosecuting a case at all. That court found that an unqualified prosecutor appearing in a case on a mention date did not invalidate the proceedings. We totally agree with the finding of that court. It was the contention of the appellants that the charge sheet was defective in that there was no mention of offensive weapons having been used and that even though charge sheet indicated that the complainant suffered personal injury as a result of the robbery there was no medical evidence adduced by the prosecution.

The Learned State Counsel in opposing the appeal argued that the charge was not defective because more than one persons were charged with the offence before court. The State Counsel relied on the case of **JOSEPH LEBOI OLE TOROKE C.R.A. 204/1987** where the Court of Appeal held that when on sets out to prove an assault, then they must call medical evidence. This case would go to support the appellants stance. However, the Court of Appeal has held that to prove charge of robbery with violence it is enough for the prosecution to any one of the three ingredients of the offence which section 296 (2) of the Penal Code and these are that at the time of that robbery the offender

***“(a) is armed with a dangerous or offensive weapon or***

***(b) is in company of one or more other person or persons or***

***(c) if at or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence on any person.”***

The Court of Appeal so held in the cases of **CHARLES OTIENO ATUNDA V. REPUBLIC CR.APP. 215/02 and OLUOCH V. REPUBLIC CR.APP. 66/1984**. It was enough that the prosecution proved that the appellants were more than one person the offence of robbery with violence was proved. The first appellant pointed out that when the complainant was recalled to give further evidence on 2.10.2003 having earlier testified on 10.9.2003, he has not sworn nor was he reminded of the earlier oath. We agree that this was an irregularity but such evidence will only be expunged from record if it has occasioned any prejudice to the appellants. In our view it has not as none is alleged. The appellants had the opportunity to object to that evidence at that stage which they did not. They went ahead to cross examine the complainant. Besides all that complainant was doing was identifying his property which was allegedly recovered and other witnesses did identify them. Such error is cured by virtue of Section 382 Criminal

Procedure Code which provides that such error or irregularity can only lead to a reversal in the court decision only if it will occasion injustice and provided that the court has regard to whether the objection could have been raised earlier in the lower court proceedings.

The key issue argued by the appellants is what they have not properly identified by P.W.1 and 2 as the assailants. The appellants contend that the evidence of P.W.1 and 2 was contradictory and there was not ample time light at the scene to enable the witnesses see the assailants and in addition the doctrine of recent possession comes into play as appellants led to recovery of P.W.1's property during the robbery which had happened some hours earlier.

As is required of us, we have re-evaluated the evidence before the trial court. The offence occurred about 9.30 p.m. I was behind the shops as P.W.1 walked towards the coffee plantation heading to his home. Both P.W.1 and 2 maintain that there were electricity lights from the shops. The court was not however told the intensity of the light, how far it was from the scene and how long the assailants were with P.W.1. It seems from P.W.2's sentence that he kept a distance between himself and the robbers and complainant. P.W.2's conduct during and after the robbery was questionable. He did not raise any alarm or tell anybody of the robbery. The reasons he gave for his failure to do so or report to the Administration Police Camp which was nearby could not hold water. Notwithstanding P.W.2 conduct and evidence we find that P.W.1 was able to ably identify first appellant who talked to P.w.1 just before the robbery, they are related and know each other well and came to close contact. There is ample evidence on record that thereafter on the next morning when P.W.1 pointed him out to police (P.W.5) first appellant led to recovery of all the stolen items save for the cash. P.W.3 and 4's evidence did corroborate P.W.1's evidence as regards recovery of P.W.1's property which P.w.3 and 4 alleged was sold or left with them by first appellant. They did not mention second appellant.

As regards the second appellant, apart from P.W.1 and 2's evidence that he was at the scene of the robbery, we find that the identity of second appellant wanting. As observed earlier, the court is not sure how much light was available at the scene of crime, and whether he was properly identified. Though arrested and at the scene when P.W.1's property was recovered, Second appellant was never mentioned as having taken or sold anything belonging to complainant. It is only P.W.5 who said second appellant claimed that first appellant sold the shoes to one Mutua but P.W.1 said something different. Since the only evidence against second appellant is that of identification which identification is shaky, we are convinced that there is some doubt regarding second appellant's involvement in the offence and he should have been given the benefit of doubt and acquitted. We hereby do give him the said benefit of doubt, we quash conviction against 2nd appellant, set aside sentence and he is hereby set at liberty unless otherwise lawfully held.

As regard first appellant, there is overwhelming evidence against him. He was found in present possession of the complainants stolen goods. He led to the recovery. The evidence by the prosecution totally displace his alleged alibi. He was at the scene of the robbery. The alleged grudge with the complainant is unfounded. We find that the conviction is safe. We hereby confirm the said conviction and sentence.

Dated at Machakos this 2nd day of November 2004

Read and delivered in the presence of

**J. W. LESIIT**

**JUDGE**

**R. V. WENDOH**

**JUDGE**

